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No. 96-54

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION LOCAL UNION NO. 28,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
and
CITY OF NEW YORK,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

THE CITY OF NEW YORK'S BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Where the Court of Appeals' affirmance of the District Court's finding of contempt was based expressly on the Union's failures to comply with previous Court orders in this case, including its failures to ensure equal membership and employment opportunities to nonwhites and admitted failures to comply with substantial recordkeeping obligations, and was not based on the Union's failure to reach the membership goal, is there any basis on this record for petitioner to maintain that the membership goal, previously affirmed by this Court, has been unlawfully transformed into a rigid racial quota?

2. Where all the parties, including petitioner, agreed that the membership goal had to be re-calculated in this case based on the demerger of one of the area Union locals in New Jersey out of Local 28's jurisdiction, is the Court's decision ordering that relief and directing that the readjustment be done using the most recent 1990 census, where the Court has made findings of continuing active discrimination by the Union, an abuse of its broad discretion?

3. Given that petitioner raises solely factual issues as to the sufficiency of some portions of the evidence to support the finding of contempt and the issue relates solely to a review of the concurrent factual findings of the Courts below, should this Court review those findings, especially where there are other uncontested portions of the findings upon which the contempt rested?

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No. 96-54

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1995

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION LOCAL UNION NO. 28,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
and
CITY OF NEW YORK,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

THE CITY OF NEW YORK'S BRIEF IN OPPOSITION

COUNTER-STATEMENT OF THE CASE

Respondent, the City of New York, respectfully requests that this Court deny the petition by the Sheet Metal Workers International Association Local Union No. 28 ("petitioner,"

"Local 28" or "the Union"), for a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Second Circuit, entered April 10, 1996. Upon review of the Court of Appeals' opinion (Pet. App. at 1a-42a), petitioner does not raise any legal issue in this Court which is presented on this record or which is a non-factual issue deserving this Court's review.

The Court of Appeals' decision, which, affirmed in part, vacated in part, modified in part, reversed in part and remanded a judgment of the United States District Court for the Southern District of New York (Carter, D.C.J.), is reported as *EEOC v. Local 638,* 81 F.3d 1162 (2d Cir. 1996) (*see* Pet. App. 1a-42a). The District Court's opinion is reported as *EEOC v. Local 638,* 889 F. Supp. 642 (S.D.N.Y. 1995) (*see* Pet. App. 43a-178a).

The background facts of this litigation are summarized in the Court of Appeals' opinion at 6a-14a. *See also Local 28 v. EEOC*, 478 U.S. 421, 426-440 (1986) (plurality opin.) ("*Local 28*"); *EEOC v. Local 638*, 753 F.2d 1172, 1174-1178 (2d Cir. 1985), *aff'd*, 478 U.S. 421 (1986) (plurality opin.).

In pertinent part, this case was commenced in 1971 by the United States, later substituted by the Equal Employment Opportunity Commission ("EEOC"), pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000-e *et seq.*, to enjoin a pattern and practice of discrimination by Local 28 and the Joint Apprenticeship Committee ("JAC")[1] against

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[1] The JAC is a management labor committee composed of Local 28 representatives and the Contractors' Associations. (continued...)

nonwhites (black and Spanish-surnamed individuals) seeking membership, training, and employment opportunities in the sheet metal industry. The City of New York ("the City") intervened as a plaintiff, and the State Division of Human Rights ("the State"), originally a third-party defendant, realigned itself with the plaintiffs. *EEOC v. Local 638*, 753 F.2d at 1175.

After trial, the District Court found that Local 28 and the JAC had unlawfully discriminated against nonwhites for admission to Local 28 in violation of Title VII and "illegally denied nonwhites access to lucrative employment opportunities in the sheet metal industry equal to that enjoyed by whites . . ." *EEOC v. Local 638*, 401 F. Supp. 467, 487 (S.D.N.Y. 1975), *aff'd as modified*, 532 F.2d 821 (2d Cir. 1976). The Court fashioned remedies designed to eradicate the effects of this discrimination, integrate the Union, and "place eligible nonwhites in the position they would have enjoyed had there been no discrimination." *Id.* at 488.

The Court issued the 1975 Order and Judgment ("O&J") that permanently enjoined Local 28, the JAC and the Contractors from "engaging in any act or practice which has the purpose or the effect of discriminating in . . . admission to

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[1] (...continued)
See Local 28, 478 U.S at 426; *EEOC v. Local 638*, 401 F. Supp. at 474. Contrary to petitioner's statement (Pet. at 5), the Sheet Metal and Air Conditioning Contractors' Association of New York City was also named as a defendant to permit complete relief, pursuant to Fed. R. Civ. P. 19(a). *EEOC v. Local 638*, 752 F.2d at 1175. Subsequently, Contractors' Associations from Long Island and New Jersey were similarly added as defendants.

membership in Local 28 . . . referral, advancement, compensation, terms, conditions, or privileges of employment" against nonwhites. O&J, ¶¶, 1, 7 at Joint Appendix (hereafter "JA"), JA112-115.

The Court also imposed a remedial 29% nonwhite Union membership goal as "essential . . . to place eligible nonwhites in the position they would have enjoyed had there been no discrimination." *EEOC v. Local 638*, 401 F. Supp. at 488; O&J, ¶ 11 at JA116. The Court issued an Affirmative Action Program and Order ("AAPO") "to assure that substantial and regular progress is made toward this goal . . . ." *EEOC v. Local 638*, 421 F. Supp. 603, 606 (S.D.N.Y. 1975), *aff'd*, 565 F.2d 31 (2d Cir. 1977). After remand led to a Revised Affirmative Action Program and Order ("RAAPO"), the July 1, 1981 deadline was extended to July 1, 1982 (JA162), and affirmed by the Court of Appeals. *Id.* at 36.

As the main route to membership was through the four-year apprenticeship program, the Court's focus was on opening the apprenticeship program to nonwhites. Even in 1975, however, it recognized that integrating Local 28's membership was not in and of itself sufficient and the O&J also imposed an affirmative duty on Local 28 ". . . to ensure that no individual is excluded from equal work opportunities, including but not limited to overtime and advancement, on the basis of race. . . ." O&J, ¶ 1 at JA113. Further, the O&J provides that Local 28 shall provide nonwhite and white journeypersons with the same assistance, including from officers and business agents, in obtaining employment and that the Union's work referral and employment activities are subject to court-ordered modification, *inter alia*, to protect nonwhite journeymen and apprentices of Local 28 from bearing a disproportionate burden

of unemployment." O&J, ¶ 21(g) at JA125; *EEOC v. Local 638*, 421 F. Supp. at 616.

In addition, the Court imposed recordkeeping obligations, including the maintenance of information on the numbers and percentages of white and nonwhite apprentices and journeypersons, and of the hours worked by each, so that plaintiffs and the Administrator[2] could monitor compliance with its orders. *Id.* at 606, 615, 620; *see* O&J, ¶ 21(e)(xii) at JA124, AAAPO, ¶¶ 4, 50-52 at JA213, 228-229.

Twice previously, in 1982 and 1983, the District Court held Local 28 and the JAC in contempt for failing to fulfill Court-ordered obligations by failing to integrate, limiting membership and employment opportunities for nonwhites, and keeping inaccurate records. See *EEOC v. Local 638*, 29 FEP Cases 1143, 1146 (S.D.N.Y. 1983), *aff'd as modified*, 753 F.2d 1172 (2d Cir. 1985), *aff'd*, 478 U.S. 421 (1986) (plurality opin.).

As it had become clear that removing the barriers to nonwhites' participation in the apprenticeship program was insufficient to ensure them equal work opportunities in the

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[2] A special master, called an Administrator, was appointed by the Court to take such actions "as he deems necessary and proper to implement and insure the performance of [the O&J and the Affirmative Action Program]..." O&J, ¶¶ 13, 14, JA117; *Local 28*, 478 U.S. at 482 (upholding the appointment of the Administrator, stressing "the difficulties inherent in monitoring compliance with the court's orders, and especially [defendants'] established record of resistance to prior state and federal court orders designed to end their discriminatory membership practices").

trade, the District Court imposed substantial relief, including establishment of an Employment, Training, Education and Recruitment Fund ("ETER Fund") and a requirement that Local 28 refer -- and the Contractors hire -- one apprentice for every four journeypersons. *EEOC v. Local 638*, 753 F.2d at 1178, 1185. The District Court also issued an Amended Affirmative Action Program and Order ("AAAPO"), which adjusted the nonwhite membership goal from 29% to 29.23% to reflect the addition of merged locals, *id.* at 1185, and set an August 31, 1987 deadline for compliance. AAAPO, ¶ 5, JA214. When Local 28 again failed to achieve that goal, the parties agreed to extend the deadline five years to August 31, 1992 (JA346). The AAAPO also mandates that "all members . . . of Local 28 share equitably in all available employment opportunities in the industry." AAAPO, ¶ 3 at JA213, *see* Pet. App. at 84a.

The Court of Appeals upheld the 1982 and 1983 contempt findings, with minor modifications, stressing Local 28's "determined resistance . . . to all efforts to integrate its membership," and the "[U]nion's foot-dragging egregious non-compliance" with Court orders. *EEOC v. Local 638*, 753 F.2d at 1183.

On Local 28's appeal, this Court affirmed, holding that the AAAPO was a permissible means to remedy past discrimination and that the relief ordered, including the membership goal were proper remedies. *Local 28*, 478 U.S. 421 (1986) (plurality opin.). In so doing, this Court found that the District Court would apply the 29.23% membership goal as a "flexible" goal, accommodating "any *legitimate* explanations, such as depressed economic conditions," for Local 28's failure to comply with the Court's orders, including

to meet the nonwhite membership goal. *Id.* at 477-478 (emphasis in original).

During the next several years, as the number of nonwhite apprentices finally increased, there nevertheless surfaced a glaring disparity of hours worked between nonwhite and white journeypersons. Following inquiries from the Administrator, in 1990, plaintiffs retained Dr. Bernard R. Siskin, Ph.D., a statistical expert, to assess the depth of the problem, which was aggravated by unemployment in the industry, and he conducted statistical studies for the years 1984 through 1991 (JA1862, JA1819, n.4, JA621). He also reviewed Local 28's census records to assess the extent of Local 28's failure to meet the membership goal, which was compounded by a higher termination rate of nonwhite members for non-payment of dues (JA621).

Thereafter, seeking to remedy persistent violations of the O&J and the AAAPO, in July 1993, plaintiffs, the City of New York and the State Division for Human Rights, moved for contempt against Local 28, or, in the alternative, to modify the AAAPO (JA276-277).[3] Plaintiffs contended that Local 28 failed to ensure or even attempt to secure the same lucrative career opportunities for its nonwhite journeyperson members as are afforded its white journeyperson members (JA279-280). They also alleged that it failed to make "regular and substantial progress" towards integrating its membership, AAAPO, ¶ 3, JA213, and again had not achieved the 29.23% goal by August 31, 1992 (JA338-344), and, instead, had actively discriminated in membership by adopting a discriminatory reinitiation policy

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[3] The EEOC did not participate in the contempt proceedings below, but supported the Court's order in the Court of Appeals and now in this Court.

for members terminated for failure to pay dues (JA520-530). Finally, plaintiffs contended that Local 28 continued to keep shoddy records and submitted inaccurate census reports, *see* AAAPO, ¶¶ 4, 51-52, 58, 60 at JA213, 229-232, which gave misleading impressions, *inter alia*, that it was making greater progress toward the goal than it was (JA399-408).

In the supporting declaration of statistical expert Dr. Bernard Siskin, his three principal findings, with supporting statistical tables (JA654-729), were (JA621-622):

1. Local 28's census reports overstated the actual percentage of nonwhite members in the Union;

2. During the period of 1984-1991, nonwhite journeypersons on average worked consistently fewer hours than white journeypersons; this disparity is statistically significant, correlated with race, and not explained by seniority, place of residence, skills, or work availability;

3. Local 28's failure to achieve the AAAPO's nonwhite membership goal is related to the fact that nonwhite journeypersons are leaving the Union at a much higher rate than white mechanics, and this disparity in turnover rates is clearly related to the hours disparity between whites and nonwhites.

Dr. Siskin's analysis showed that, after nonwhite apprentices provided four years of cheap labor for contractors, upon graduating and thereby qualifying for the higher wages earned by journeypersons, they are much more likely than their white counterparts to be shut out of the job market or relegated to sporadic, short-term employment (JA631-638, JA1832-1836). Thus, the number of hours worked by nonwhite

journeypersons over the period 1984 to 1991 was much less than would be expected given the percentage of nonwhite journeypersons eligible for work, and, in each year, the shortfall was well over three units of standard deviation, a very high degree of statistical significance (JA631-638, JA1833). *See Hazelwood School District v. United States*, 433 U.S. 299, 311 n.17 (1977).

Despite its obligations to make substantial progress towards the membership goal and to ensure equal work opportunities for its nonwhite members, Local 28 refused to make any plans to reach the goal or to take any steps to address the hours disparity and unemployment (JA338-344).[4]

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[4] Without citation to the record, petitioner repeatedly states that its diligence is evidenced by its purported voluntary efforts to increase the apprentice program (*see*, *e.g.*, Pet. at i, 2, 17). That argument is baseless, as the District Court held (86a). Rather, the record shows that the only action taken in an attempt to reach the goal was taken by defendant JAC, and not by Local 28 (JA338-JA341). The JAC agreed in 1987 to indenture nonwhite apprentices at the rate of three nonwhites to every one apprentice. As nonwhite journeypersons are leaving the trade at a substantially higher rate than white journeypersons, increasing the number of nonwhites in the apprentice program does not discharge the Union's responsibilities under the Court's orders. And, the record shows that both in a meeting held with plaintiffs on October 21, 1992 and in a conference before Administrator Raff held on November 12, 1992, the Union's attorney, Edmund P. D'Elia, admitted that no other steps had been taken to reach the goal and was unreceptive to considering further

(continued...)

Plaintiffs also urged that Local 28 could have invoked either of two key mandatory provisions in the Collective Bargaining Agreement, as follows (JA341-342, 363):

> Whenever, in the opinion of the Union, unemployment has risen to the point where some corrective action, in its opinion, should be taken, the Manpower Committee shall meet within forty-eight (48) hours to attempt to place the men in jobs.
>
> * * *
>
> During periods of unemployment, there shall be established a mandatory two-week furlough system. The procedures to be adopted and/or formulated concerning said furlough system shall be referred for consideration to a joint subcommittee consisting of both management and labor.

The record shows that plaintiffs had asked the Union whether it had invoked these provisions during the prior six years, and if not, why not (JA393-394). In response, the Union conceded that it had done neither, claiming that there was full employment in August 1991 and that a mere "smattering of unemployment" started in November/December 1991 (JA395), a conclusion which contrasted starkly with Dr. Siskin's findings from the Union's records that nonwhites were not experiencing full employment as early as 1984 and through 1991 (JA632-633, 714).

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[4] (...continued)
actions in order to reach the goal in the future (JA338-JA344).

Following the contempt motion, although the Contractors' Associations withdrew from the discussions, plaintiffs and Local 28 entered into several agreements, embodied in three separate proposed signed stipulations and orders, which were submitted to the Court. Local 28 agreed to institute and pay for a new computerized recordkeeping system in the Recordkeeping Stipulation, which was signed by the Court (Pet. App. at 50a), and also agreed to changes in its reinitiation policy (Pet. App. at 162a-166a). In addition, in the March 1994 Hiring Hall and Job Rotation System Stipulation, approved by vote of the Union's membership (JA750), the Union agreed to implement an independent hiring hall and also agreed that a potential job rotation system would be implemented one year later if certain conditions prevailed and with various safeguards (Pet App. at 151a-161a).

Thereafter, Local 28 opposed the motion for contempt as not supported by clear and convincing evidence, unwarranted based on the stipulations, and argued that the employer contractors bore ultimate responsibility for the hours disparity because journeypersons are employed "at will" (JA730-JA760, JA824-JA883). Plaintiffs' Reply Declaration proffered considerable evidence further demonstrating the significant role of the Union's business agents in formally and informally referring Union members to jobs, shown in, *inter alia*, Union admissions, statements by contractors, and testimony by a Union officer at a 1991 public hearing (JA1463-JA1473).

THE DISTRICT COURT OPINION

The District Court held Local 28 in contempt for several violations of the Court's 1975 O&J and the 1983 AAAPO (*EEOC v. Local 638*, 889 F. Supp. 642, Pet. App. at 43a-178a). First, Local 28 violated its recordkeeping obligations,

including failing to keep records required by the O&J and AAAPO and the submission of misleading inaccurate data to the Court, particularly its inflation of its census of nonwhite members (Pet. App. at 58a-68a). Second, Local 28 failed to fulfill its affirmative responsibility to ensure equal employment opportunities for its nonwhite members, evidenced by the highly statistically significant hours disparity, for which it was at least partially responsible based on its failure to invoke those provisions in the collective bargaining agreement meant to give it some power to deal with periods of unemployment and to disperse membership hours more evenly, and by the failure of its business agents to refer nonwhite members to jobs in a nondiscriminatory manner (Pet. App. at 84a-88a). Finally, Local 28 had adopted a new reinitiation policy for suspended or terminated members in 1988 and its implementation of the policy in a discriminatory manner violated prior Court orders and also thwarted progress towards the nonwhite membership goal (Pet. App. at 92a-95a).

The Court also cited the Union's failure to reach the membership goal as a "symptom" of Local 28's refusal to stop discriminating against whites in admission to the Union and in the provision of equal job opportunities, but specifically stated that the contempt finding was based on the Union's continued active discrimination, and not on the failure to reach the membership goal (Pet. App. at 75a-77a, 71a).

In order to remedy the contempt and the serious effects of the Union's continuing and past discrimination, the Court imposed various narrowly-tailored remedial measures, several of which the Union had agreed to in the signed stipulations.

Thus, the Court approved the Recordkeeping Stipulation and authorized the Administrator to appoint a Field Monitor to

visit job sites to check the veracity of the Union's reports (Pet. App. at 50a, 148a). The Court also required changes in the Union's discriminatory reinitiation policy as a remedial measure to compensate victims of that policy, although in a somewhat different form than the stipulation (Pet. App. at 75a-77a, 148a-150a). Finally, with minor modifications, the Court ordered the implementation of a hiring hall and potential job rotation system, to which the Union had agreed by stipulation, and which would have taken effect only if high unemployment in the industry persisted and the hiring hall did not eliminate the hours disparity between white and nonwhite journeypersons (Pet. App. at 108a-138a, 146a-147a).

The Court ordered backpay for Union members deprived of employment opportunities in the past and an increase in Local 28's contribution to the ETER Fund (Pet. App. at 102a-106a, 145a-146a). The Court also ordered that the nonwhite membership goal of 29.23% be adjusted in light of the demerger of Local 28 and a local in northern New Jersey, as all the parties had agreed and also using the current census, and also ordered the parties to negotiate the procedure for calculating the new goal (Pet. App. at 75a-77a, 143a-144a, 150a). Finally, the Court ordered the Union to pay plaintiffs' costs, expert fees, and attorneys' fees, but denied a requested $100,000 fine (Pet. App. at 106-108a, 146a).

THE COURT OF APPEALS OPINION

Following an appeal by Local 28 and separately by the defendant Contractors' Associations, the Court of Appeals affirmed the District Court's decision to hold the Union in contempt and upheld some of the relief ordered, reversed other relief, and modified the relief in some respects. It remanded the case to the District Court "for further proceedings in

accordance with [its] opinion." *EEOC v. Local 638,* 81 F.3d at 1182 (Pet. App. at 42a).

The Court of Appeals expressly affirmed the finding of contempt on grounds other than the Union's failure to reach the membership goal, although it rejected the Union's argument that the nonwhite membership goal was an impermissible quota in light of its own and this Court's previous decision in this case (Pet. App. at 14a-15a).

The Court of Appeals thus upheld all of the reasons relied upon by the District Court to find Local 28 in contempt for its egregious recordkeeping violations and for its failure to ensure equal employment opportunities for nonwhite journeypersons, rejecting the Union's attack on plaintiffs' statistical evidence of a pervasive hours disparity (Pet. App. at 16a, 19a-22a). The Court upheld the District Court's finding that Union business agents discriminated against nonwhites in providing assistance to members to find work and its finding that the Union failed to invoke the two collective bargaining provisions or take any affirmative steps, pursuant to the O&J, that might have created additional job opportunities for nonwhite journeypersons (Pet. App. at 19a-22a).

The Court of Appeals agreed that Local 28's policy of refusing to reinitiate members for more than two years was a basis for contempt (Pet. App. at 25a-26a). Because plaintiffs had not raised other objections to the policy, the Court rejected the District Court's extension of the contempt finding to other aspects of the reinitiation policy, including payment of fees and all back dues as a prerequisite to readmission and remanded for further consideration (Pet. App. at 26a).

With respect to the remedial relief, the Court of Appeals, *inter alia*, affirmed the decision to require the Administrator to increase the Union's contribution to the ETER Fund, without prejudice to a subsequent contention by the Union, that the actual increases ordered do not accord with the requirements of either compensatory or coercive remedies (Pet. App. at 30a-31a). It also affirmed that backpay may be awarded to underemployed journeypersons, although it vacated the order directing that back pay hearings be held and directed that there must be an opportunity for the Union to present evidence that a particular person's underemployment was not due to the Union's discrimination, but to other factors, such as discrimination by the contractors (Pet. App. at 28a-30a).

In addition, as noted above, the Court of Appeals remanded for further consideration certain objections to the reinitiation policy that had not been raised in the contempt motion and therefore vacated the portion of the contempt order that forbade the Union from charging fees and back dues to nonwhite journeypersons who had been suspended or terminated from the Union (Pet. App. at 30a-31a). The Court affirmed the District Court's order that the membership goal be reformulated, stating, *inter alia*, that the primary purpose of the District Court's orders has been to eliminate discrimination and that, in exercising its equitable powers, the District Court has broad discretion to adjust the goal when circumstances warrant, such as here where "it is undisputed that large shifts in Local 28's membership have occurred since the goal was last modified" (Pet. App. at 32a-33a).

Finally, as to the Contractors' Associations' appeal, the Court of Appeals reversed and vacated the relief of the hiring hall and potential job rotation system on the ground that it imposed more than "minor and ancillary" relief upon the

contractors, under the standard set forth in *General Building Contractors Assoc. v. Pennsylvania*, 458 U.S. 375 (1982) (Pet. App. at 33a-38a).

REASONS FOR DENYING THE PETITION

Upon review of the Court of Appeals' opinion (Pet. App. at 1a-42a), petitioner does not raise any legal issue in this Court which is presented on this record or which is a non-factual issue deserving this Court's review. Accordingly, the petition for a writ of certiorari should be denied.

(1)

The primary argument raised by petitioner is that the membership goal has been impermissibly transformed into a rigid racial quota (*see* Pet. at 2, 13-18), a concern expressed in Justice O'Connor's dissenting opinion on this issue. *Local 28*, 478 U.S. at 497-498.

However, notwithstanding petitioner's elaborate attempt to frame this as a viable issue, on this record, it is not. In upholding the contempt finding, the Court of Appeals' opinion makes clear that it based its affirmance of the District Court's contempt order on bases other than the failure to reach the membership goal by the agreed-upon date (Pet. App. at 14a-15a, *see also* 27a). Furthermore, the District Court cited the failure to reach the goal simply as a "symptom" of Local 28's refusal to stop discriminating against whites in admission to the Union and in failing to ensure that nonwhites were not deprived of equal employment opportunities, and specifically stated that it was on this continued active discrimination, and not on the failure to reach the membership goal, that the

contempt finding was based (Pet. App. at 75a-76a, *see* 88a).

See also Local 28, 478 U.S. at 441 n.21 (this Court rejected review of the issue of the correctness of the calculation of the original nonwhite membership goal, noting that the District Court had expressly stated that petitioner was not being held in contempt for the failure to attain the goal and that a "contempt proceeding does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed and thus become a retrial of the original controversy" (citations omitted)).

The use of the goal as a "benchmark" was previously upheld by this Court and the Second Circuit Court of Appeals. *See Local 28*, 478 U.S. at 477-478, *EEOC v. Local 638*, 753 F.2d at 1186-1187. In so doing, this Court found that the District Court would apply the 29.23% membership goal as a "flexible" goal, accommodating "any *legitimate* explanations, such as depressed economic conditions," for Local 28's failure to comply with the Court's orders, including to meet the nonwhite membership goal. *Id.* at 477-478 (emphasis in original).

In the instant case, in addition to not resting the contempt finding on the failure to meet the membership goal, the District Court stressed that the Union has not made any showing, with supporting evidentiary documentation for its failure to comply, and further, it has never sought to modify or terminate any of its obligations under the O&J and AAAPO, including to meet the Court-approved membership goal, based on alleged difficulty or impossibility of meeting the goal (Pet. App. at 73a-74a). *See, e.g., Wilder v. Bernstein*, 49 F.3d 69 (2d Cir. 1995); *People by Abrams v. Terry*, 45 F.3d 17, 23 (2d Cir.

1995); *see also S.E.C. v. Musella*, 818 F. Supp. 600, 602 (S.D.N.Y. 1993).[5]

Accordingly, under the circumstances presented on this record, petitioner's strident arguments that the District Court will not flexibly apply the goal (Pet. at 16-18) are simply unsupported. In the absence thereof, petitioner's efforts to make this case into something that it is not do not warrant review by this Court. This is especially so where there are ample bases for the contempt, including findings of ongoing active discrimination and other findings of continuing violations of the O&J, some of which were unchallenged by petitioner.

(2)

Petitioner's second point wrongly states that the Courts below have ordered "raising" the membership goal "solely" based on the use of the 1990 census (Pet. at 18-22). That is also a non-issue on this record, and is not deserving of this Court's review.

In particular, at this juncture, what the Courts have done is to order that there be a readjustment of the membership goal based on the demerger of Local 28 and a local in northern New Jersey and also in light of the 1990 census (Pet. App. at 32a-33a, 143a-144a, 150a).

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[5] Thus, petitioner's argument that the instant case presents "timely and important issues concerning the standards governing implementation and, ultimately, termination of racially-preferential remedial measures" (Pet. at 4) is a red herring on this record.

Glaringly absent from petitioner's brief is an acknowledgement that, before these contempt proceedings began, petitioner agreed in a signed stipulation that there had to be a recalculation of the membership goal given the demerger and the resulting change in the relevant labor pool (Pet. App. at 77a, *see* JA369-JA384, JA761-JA763). Moreover, such readjustments for a merger with other locals had been previously done, including the 1983 adjustment of the nonwhite membership goal from 29% to 29.23%, *see EEOC v. Local 638*, 753 F.2d at 1185, as even petitioner admits *(see* Pet. at 5, n.3).

Accordingly, it was only in the context of that necessary and agreed-upon readjustment, that the District Court logically directed that the current 1990 census be used, rather than the dated 1970 census, which would no longer be relevant to the present labor pool (Pet. App. at 32a-33a, 76a). Furthermore, the Court was fully aware of several types of ongoing active discrimination by the Union, including the substantial recordkeeping violations which grossly inflated census reports to make the Union appear closer to the goal than it was, as well as its discriminatory reinitiation policy. The District Court's decision to order that the goal be readjusted thus also recognized that there was "continued noncompliance by the Union" (Pet. App. at 140a).

The Court of Appeals affirmed the District Court's decision, finding that it was a proper exercise of the District Court's continuing equitable jurisdiction. *See, e.g., Freeman v. Pitts*, 503 U.S. 467, 487 (1992); *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 380 (1992); *United States v. United Shoe Machinery Corp.*, 391 U.S. 244, 251 (1968).

Contrary to petitioner's dire speculations, moreover, there is no indication on this record as to what the actual readjustment will be, and the actual methodology for the readjustment based on the demerger and using the 1990 census is to be worked out among the parties with the Administrator (Pet. App. at 150a). Furthermore, while petitioner sets forth a figure of 49% for the nonwhite population in New York City, allegedly based on the 1990 census (*see* Pet. at 18), what petitioner does not recognize is that the actual calculation of the figure is not taken from any type of general census figures, but rather involves a much more complicated use of specific census tables which reflect the relevant labor pool, including different educational mixes. *See EEOC v. Local 638*, 401 F. Supp. at 488-489, 492-493. It thus remains unknown exactly how the adjustment of the membership goal based on the demerger and using the 1990 census will actually affect the goal, notwithstanding petitioner's protestations.

The purported conflict with the case of *United States v. City of Miami*, 2 F.3d 1497 (11th Cir. 1993) (which we note was never even cited by petitioner in either of their briefs in the Court of Appeals), as well as a number of school desegregation cases, such as *Pasadena City Bd. of Educ. v. Spangler*, 427 US. 424, 435 (1976) (*see* Pet. at 19-21), is nonexistent. Those cases involve instances where remedies were found to be improperly imposed to alleviate racial imbalance which was not related to past discrimination caused by the defendants' actions or where there were findings that the defendants had already complied with the remedial orders and there was no basis for continuing court jurisdiction. In stark contrast to those cases, the ordered change here is not to account for changing demographics, rather it comports with the purpose of the goal -- to provide a benchmark to measure the Union's progress in remedying both its past discrimination, and

also ending its more recent ongoing active discrimination through continued noncompliance with Court orders.[6]

(3)

Petitioner's third and final point argues that it is being held in contempt based on the actions of the employer contractors, rather than its own actions (Pet. at 22-29). This argument not only distorts the Court of Appeals' and District Court's opinions, but also raises factual issues which this Court does not sit to review.

It is well-settled that this Court does not sit to review factual issues. *See, e.g., United States v. Johnson*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts"). Furthermore, "a court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very

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[6] Despite petitioner's emphasis that the District Court ordered that the recalculation of the membership goal also require a separate calculation of the goal for journeypersons (Pet. at 14-15), petitioner did not challenge that separate recalculation of the goal in its appellant's brief in the Court of Appeals (*see* Pet. App. Br. in the Court of Appeals, pp. 43-49; City/State Br., p. 47; EEOC Br., p. 36, n.9), raising it for the first time in its reply brief (Pet. App. Reply Br., p. 23), and cannot do so now in this Court. In any event, the Court properly exercised its equitable powers to modify the order based on the Union's continued noncompliance and changed circumstances. *United States v. United Shoe Machinery Corp.*, 391 U.S. at 251-252.

obvious and exceptional show of error." *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949). *See also Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987). Even petitioner eventually acknowledges, albeit reluctantly, these controlling principles (Pet. at 29), which warrant denial of this petition.

In addition, petitioner's argument is at odds with all the reasons found by District Court (Pet. App. at 84a-88a) and by the Court of Appeals in its careful discussion (Pet. App. at 17a-24a). The District Court made clear that the Union is being held responsible solely for its own actions in not meeting its court-ordered affirmative obligations to ensure that nonwhites are not deprived of equal employment opportunities and in actively contributing to the inability of nonwhites to find work (Pet. App. at 87a-88a).[7]

See generally EEOC v. Local 638, 401 F. Supp. at 490 (Court's orders have been "aimed at protecting nonwhites admitted into union and apprentice membership from bearing

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[7] Although Local 28 now claims that this case is the "mirror image" of *General Building Contractors Assoc. v. Pennsylvania*, 458 U.S. 375 (1982) (*see* Pet. at 22-25), once again, it failed to mention that case in either its main brief or reply brief in the Court of Appeals on this point, despite the Contractors' Associations' heavy reliance thereon with respect to the hiring hall remedial relief. In any event, however, Local 28's reliance is clearly misplaced in light of its posture in this case, *i.e.*, having been found liable in multiple court decisions for egregious Title VII violations over a lengthy period and then in contempt of Court-ordered remedial relief, it has now been found in contempt, once again, for violations of existent Court orders and its own continued active discrimination.

a disproportionate burden of the unemployment" caused by a depressed construction industry). *See also EEOC v. Local 638*, 753 F.2d at 1182, citing *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 192 (1949) (parties are bound by a court order and disregard it at their own peril).

Furthermore, contrary to petitioner's arguments (Pet. at 25-29), the Court of Appeals thoroughly and appropriately reviewed the District Court's findings and the record here Pet App. at 17a-24a, 26a).

While a detailed rebuttal of petitioner's various factual contentions is thus superfluous given that this Court does not review factual issues, petitioner has not shown in any manner that the District Court's findings were palpably deficient. Rather, the record fully supports the Court findings that, *inter alia*: 1) the Union makes formal job referrals for fan maintenance jobs and jobs from outside contractors, as the Union admitted,[8] and 2) its business agents play an informal

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[8] Despite Local 28's repeated contentions that it is an "undisputed" fact that the hours referred by its business agents account for only 2% of total hours worked by journeypersons (Pet. at 9, 11, 27-28), this is misleading and contrary to the District Court's findings that the role of the business agents was substantially more (Pet. App. at 86a-88a). Moreover, in support of their argument that Union referrals were significant, plaintiffs noted that even Union President/Secretary Joseph Casey had acknowledged that the Union makes formal referrals for at least 2% of the jobs worked by Union members, *see* JA999-1000, but he did not provide the data upon which that assertion was made, and thus the percentage could be greater (Pl. 6/17/94 Reply Mem., p. 62, n.15).

but important role in helping members get other jobs, from telling Union members on an informal basis about where Union shops are hiring to great influence over the Contractors' hiring decisions (Pet. App. at 84a-88a,17a-24a).

In fact, this role with respect to hiring has long been recognized. *EEOC v. Local 638*, 401 F. Supp. at 474 (". . . business agents call Local 28 members and advise them of job opportunities; sometimes members call the agents seeking information on work openings. In good times, each business agent makes a job referral approximately five to ten times a week"). It was also confirmed by a contractor opposing the hiring hall and job rotation system (JA1200, ¶ 3, stating that contractor "contacts Local 28 for recommendations" in determining whom to hire). *See also Local 28*, 478 U.S. at 478 (noting that, *inter alia*, "access to admission, membership, training and employment in the industry had traditionally been obtained through informal contacts with union members").

For all these reasons, the concurrent factual findings of the Courts below do not warrant review by this Court. Indeed, notwithstanding petitioner's argument on this point, petitioner totally ignores a key aspect of its responsibility here in that the Courts also found that the Union implemented a reinitiation policy that discriminated against nonwhites (Pet. App. at 24a-26a, 89a-97a), an area in which the contractors had no role. In this Court, the Union does not even contest this finding, apparently finally recognizing that restrictions on admission of nonwhites into Local 28 are strictly prohibited. O&J, ¶ 1, at JA112-113.

For all the above reasons, and those stated in the brief in opposition submitted by the Solicitor General on behalf of respondent Equal Employment Opportunity Commission, the petition for a writ of certiorari should be denied.

CONCLUSION

FOR ALL THE FOREGOING REASONS, THE PETITION SHOULD BE DENIED.

Respectfully submitted,

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